IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 408 of 2003

WITH

CIVIL APPLICATION No 7871 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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SARGAM (BEHRAMPURA) OWNERS' ASSOCIATION - THRO' CHAIRMAN

Versus

GIRISHBHAI DASHRATHBHAI PATEL

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Appearance:

1. Appeal from Order No. 408 of 2003

MR SURESH M SHAH for Petitioner No. 1

MR AMAR D MITHANI for Petitioner No. 1

MR MB GANDHI for Respondent No. 1-2

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CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 25/03/2004

CAV JUDGEMENT

This Appeal From Order is filed against the order passed by the learned City Civil Judge, Ahmedabad below notice of motion application Exh.7 in Civil Suit No. 2040 of 2003 on 13.10.2003 whereby ad-interim relief granted on 13.08.2003 and extended from time to time was vacated.

2. This Court has issued notice on 10.11.2003 and notice as to interim relief was also issued in Civil Application. The Court has further directed to maintain status-quo and the same was continued till this date.

3. The appellant is the original plaintiff. It is an association duly registered as Non-Trading Corporation under the Provisions of Bombay Non-Trading Corporation Act, 1959 having its Registration No. 9678. The appellant is holding in its name Final Plot No. 54-A admeasuring about 700 Sq. Mts. on which in all 32 flats have been constructed. The appellant has purchased the said piece of land under the Regd. Sale Deed dated 25.06.1998 and necessary mutation entry was also effected in the record of rights. On the Eastern side of the said property, there is 06.09 Mtr. wide private road of which the appellant claims to be the owner. However, the dispute is raised with regard to this road as it is the case of the respondents that the said road is a common road and it is to be used for ingress and outgress purposes and there is no exclusive right of the appellant over the said road.

4. To protect its right over the said road, the appellant has filed Civil Suit No. 2040 of 2003 before the City Civil Court at Ahmedabad and in the notice of motion application Exh.7, interim relief was prayed for to the effect that the present respondents who are the defendants in the said suit should be restrained from demolishing the wall standing on the northern side of the appellant's property and that they should be further restrained from causing any damage or making any encroachment or from entering into the property of the appellant or from causing any damage to the temple of the appellant.

5. After hearing the parties at length and after considering their pleadings, the learned City Civil Judge has rejected the N.M. application by holding that the appellant has erected the wall on the disputed road just before institution of the suit and under the ex-parte order, the appellant has erected such wall and

thereafter, the appellant has prayed to restrain the respondents from demolishing the said wall and further preventing them from entering into disputed road for ingress and outgress purpose. The Court has further observed that erection of any construction made for Devsthan or any other purpose would not create any lawful right on the disputed road. The Court has, therefore, come to the conclusion that looking to the conduct of the appellant, it was not entitled to seek any discretionary relief from the Court and even on merits, the Court has held that the appellant failed to prove title over the disputed road and interim relief was accordingly refused.

6. It is this order which is under challenge in the present Appeal From Order.

7. Mr. Suresh M. Shah and Mr. Amar D. Mithani, learned advocates appearing for the appellant submit that the learned Trial Judge has failed to appreciate the fundamental dispute wherein according to the appellant, there is no further road behind the appellant's land, whereas as per the case of the respondents, the road is available further on the northern side. None of the documentary evidence shows any existing road as shown by the respondent. As per the case of the respondent, the road admeasuring 6.09 mtr. comes straight from CNI Church to the northern direction to land of the respondent No.2. However, on this alleged road itself, the Court Commissioner has found the old house , the appellant's tube well, drainage etc. and hence, there is no question of any public right available for ingress and outgress. There are other two roads admittedly available to the respondents and hence, it cannot be said that they are without any road for ingress and outgress purposes. Even in the sanctioned plan, the road to the appellant's building is shown to be a private road and hence, at this stage it cannot be presumed to be a public road. More over, the said road is not shown in any map proceeding further to the northern side and still the Trial Court has proceeded on that presumption and surmises. There was a total non-application of mind on the part of the Trial Court as on the one hand, it was held that the wall was newly constructed whereas the documents on record itself show that the said wall was existing even at the time of earthquake in 2001. Even the Court Commissioner has found the broken wall on the site. The Court has erroneously come to the conclusion that the genuineness and correctness of the documents produced by the parties are not challenged. As a matter of fact, the appellant had given an application to initiate action under Section 340 of the Criminal Procedure Code against the

respondents for forging and concocting the document mark 23/1. Even for the sake of arguments, it is assumed that the construction placed by the learned Trial Judge on the Regd. Sale Deed is correct, even in that case, in any manner it does not show that the road leads further to the northern direction. As far as the ownership aspect is concerned, Mr. Shah has submitted that while deciding the interim application, it is not an issue to be decided, but the real issue to be considered is as to whether road proceeds further in the northern direction is to be accepted or not. Mr. Shah has heavily relied on the respondents' written statement filed before the Trial Court wherein it is mentioned that the plaintiff has illegally removed the wooden door situated at the disputed site and has broken some portion of the wall and thereafter, it was newly constructed only with a view to show that it was a compound wall right from the beginning. This fact itself shows that the wall was there and initially there was a wooden gate also. While rejecting the interim application, the Trial Court has permitted the respondent to take law in their hands and because of that, the appellant as well as its members were seriously prejudiced. The impugned order passed by the Trial Court is required to be quashed and set aside and interim injunction as prayed for in the notice of motion application is required to be granted.

8. Mr. M.B. Gandhi, learned advocate appearing for the respondent has submitted that plot bearing Survey No. 54 was sub-divided into seven plots. Sub-plot No. 7 was of the measurement of 491 sq.mtrs. and the said plot is approved as the common passage for all the six sub-plot holders as well as the different owners of Part-B of the said Survey No.54, as the original Survey No. 54 was divided into two parts, namely, 54/A/1 and 54/A/2 and all the sub-plot holders have a right in sub-plot No.7 admeasuring about 491 Sq. Mtrs. Mr. Gandhi has further submitted that the appellant has no title whatsoever on the disputed land as in the Sale Deed produced by the appellant under which the title to the property is claimed or right of exclusive user is claimed itself shows that on the eastern side of its plot, there is an open land/way, namely, passage of the measurement of 6.09 Sq. Mtrs. width and moreover, the respondents, at the time of purchase of their property have entered into an Agreement with different sub-plot holders in which there is a specific reference about the road or right of ingress and outgress into the open sub-plot No.7.

9. Mr. Gandhi has further submitted that for the purpose of construction over the plot of the appellant,

the appellant has got approval from the Ahmedabad Municipal Corporation and the plans were sanctioned and in the approved plan, the appellant has shown 6.09 mtr. wide private road and only on that basis, the plans were sanctioned by the A.M.C. In village Form No.6, a division of plots is shown since 1969. Sub-plot No. 7 is specifically shown by way of road to be used commonly for all the holders of the Survey No.54/A/1 and 54/A/2.

10. Mr. Gandhi has further submitted that even the competent authority under the Town Planning Act has prepared a plan and in the final plot No. 54 under the Town Planning Scheme, the competent authority has shown 6.09 Sq. Mtrs. wide road. All these documentary evidence unequivocally suggests that there is a road which is to be kept open for the use of all and hence, the appellant cannot claim the exclusive ownership over the said land nor it can put any construction over it. Since the appellant has not established its prima facie case before the Trial Court nor even in a position to satisfy the Trial Court with regard to the ownership of the said road, the Trial Court has come to a just and proper conclusion by refusing the interim injunction in favour of the appellant and since the appellant has not come with clean hands, the appellant was not entitled to claim any discretionary, equitable relief from the Trial Court. The impugned order of the Trial Court is required to be confirmed and the appeal be dismissed with cost.

11. After having heard learned advocates appearing for the respective parties and after having considered the documentary evidence which are produced before the Court, I am of the view that the impugned order passed by the Trial Court does not call for any interference by this Court in the present Appeal From Order. The appellant has not produced any documentary evidence to show that the appellant is the exclusive owner of the disputed road. On the contrary, the documentary evidence which is on record unequivocally proves that the disputed road is for common ingress and outgress purposes. The Sale Deed dated 25.06.1998 refers to the fact that the appellant has purchased the land bearing Final Plot No. 54/A admeasuring about 700 Sq. Mtrs. with the construction standing thereon with 20 Feet road with the rights of ingress and outgress. It was also mentioned in the schedule under the remark column that in the said Final Plot, there is a 20 Feet road with joint ownership rights. Since the agreement is under dispute, the Court does not take any cognizance of this agreement at present. However, in village Form No.6, it shows that

Final Plot No. 54/A was sub-divided into seven sub-plots and sub-plot No.7 admeasuring about 499 Sq. Mtrs. is specifically shown as road. In the approved plan also, 6.09 Sq. Mtrs. is separately shown. This documentary evidence clearly show that the appellant has no any exclusive right over the said land and even if it is assumed that there was an existing wall or a gate, as contended by the appellant, no protection can be granted as granting of such protection would result into deprivation of the rights which are conferred on the other plot holders. Simply because something is mentioned in the written statement to the effect that there was a broken gate or the wall was damaged that would not confer any legal right over the appellant. More over, when the appellant has purchased the property with clear-cut understanding that there is a 20 Feet road for common ingress and outgress, and if any construction is made thereon subsequently, that would be contrary to the agreement arrived at between the parties and in contravention of that agreement, if something is done that would not be perpetuated under the order of the Court. The Trial Court has, therefore, come to a right conclusion holding that the appellant could not establish its right over the disputed road and hence no protection can be granted to the appellant.

12. In the above view of the matter, the Court does not find any infirmity in the order passed by the Trial Court which requires interference by this Court while entertaining or allowing the present Appeal From Order. Since there is no substance or merit, the present Appeal From Order is dismissed. Interim relief granted earlier is vacated. Rule discharged in Civil Application No. 7871 of 2003 without any order as to costs.

[K.A. PUJ, J.]

13. After the pronouncement of this judgment, Mr. Amar D. Mithani, learned advocate appearing for the appellant has asked for stay against the implementation of this judgment so as to enable the appellant to approach the higher forum. Mr. M.B. Gandhi, learned advocate appearing for the respondent has strongly objected and submitted that the appellant has no right over the suit property and hence no stay be granted against the implementation of the impugned order. In

view of the finding recorded by this Court in this judgment, the request for extension of stay is rejected.

[K.A. PUJ, J.]

#Savariya#

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